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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 412

MARI TOLLEFSEN TODOK AND KNUTE C. ENGEN, PETITIONERS,

vs.

UNION STATE BANK OF HARVARD, NEBRASKA, A CORPORATION; LEROY A. MEGRUE AND BERTHA M. MEGRUE, ROBERT E. BROWN AND ANNA S. BROWN, H. G. THOMAS, ADMINISTRATOR OF THE ESTATE OF CHRISTIAN KNUDSON, DECEASED; THEODORE GRIESS, VAN E. PETERSON, AS RECEIVER OF THE UNION STATE BANK OF HARVARD, NEBRASKA; NEBRASKA STATE BANK OF HARVARD, NEBRASKA, AND THE FIRST TRUST COMPANY OF LINCOLN, NEBRASKA, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA AND BRIEF IN SUPPORT THEREOF.

FRANK E. EDGERTON,
H. G. WELLENSIEK,
C. C. FRAIZER,
NORRIS BROWN,
Counsel for Petitioners.

(34,543)

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PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Mari Tollefsen Todok and Knute C. Engen respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

1. That petitioners are the widow and the son of Christian Knudson, deceased, sometimes known as Christian Engen, a citizen of Norway, who resided in Nebraska from 1878 until his death intestate August 6, 1923.

2. That the petitioner Mari Tollefsen Todok was the lawfully wedded wife of said Christian Knudson and a citizen of Norway and at all times has resided and still resides in the Kingdom of Norway; that the son of said Christian Knudson and said Mari Tollefsen Todok, the petitioner Knute C. Engen, is a citizen of the United States, residing in Seattle, Washington.

3. That this action was originally brought in the District Court of Hamilton County, Nebraska, July 25, 1925, to quist title in the petitioner Knute C. Engen to the 160-acre homestead of said Christian Knudson, deceased, he having in his lifetime deeded away this homestead to respondents without the signature and acknowledgment of the petitioner Mari Tollefsen Todok, his lawful wife, as required by the laws of the State of Nebraska.

4. That the petitioner Mari Tollefsen Todok filed a cross-petition asking that title to half of the homestead of her husband be quieted in her.

5. That the trial court held said land to be his homestead and held said deeds to his homestead void under

the Nebraska law because not signed and acknowledged by the wife of said decedent, the petitioner Todok herein.

6. That *Section* 2819 *Comp. St. Nebr.* 1922, provides and did provide during all the years this homestead was owned by Christian Knudson as follows:

> "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

That *Section* 2832, *Comp. St. Nebr.*, 1922, provided on August 6, 1923, the date of Knudson's death, as follows:

> "If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected, in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will."

That from 1875 to 1920, Art. 1, Sec. 25, of the State Constitution of Nebraska provided:

> "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property."

7. That the Supreme Court of the State of Nebraska reversed said decision of the trial court on the sole

ground that the Treaty between United States and Norway gave to citizens of Norway owning property in Nebraska the unlimited, unrestricted and unqualified right to "freely dispose" of real estate owned in Nebraska by them, and that under said Treaty as it was construed and applied by said Nebraska Supreme Court it was not necessary for citizens of Norway to comply with the provisions of the Nebraska law in conveying homesteads in Nebraska *Engen* v. *Union State Bank*, 223 N. W. 664).

8. That the Treaty of Norway so far as same is involved in said construction is as follows:

> "The subjects of the contracting parties in the respective states may freely dispose of their goods and effects either by testament donation or otherwise in favor of such persons as they think proper; and their heirs in whatever place they shall reside shall receive the succession even *ab intestato*, either in person or by their Attorney." Section 6 of said Treaty.

9. That Christian Knudson was born in Norway January 10, 1845, and removed to America June 22, 1868; that he married the petitioner Mari Tollefsen Todok in 1867, and Knute C. Engen, their son and petitioner herein, was born January 19, 1869, and came to America in 1893.

10. That said Knudson left in Norway his wife, the petitioner, who, in January of 1869, gave birth to his son, the petitioner, Knute C. Engen, and that neither Knudson nor his wife, the petitioner herein, ever secured a divorce and she remained in Norway and he in

America and he did not complete his naturalization papers and did not become an American citizen, merely having taken out his first papers.

11. That in May, 1886, Knudson bought the 160 acres of land in controversy and established his homestead thereon with his aged dependent father and mother, whom he continued to support on said homestead until their deaths in 1900 and 1906; and thereafter he continued to reside upon said homestead, never deserting same.

12. That on July 17, 1923, Christian Knudson, blind and decrepit, signed the deeds in question by mark, conveying his homestead to nephews and nieces who were heavily indebted to the Union State Bank of Harvard, Nebraska; that the deeds were signed by mark with no person present but officers, directors and Attorney of the Bank.

13. That without the signature and acknowledgment of Knudson's lawful wife, the petitioner herein, Mari Tollefsen Todok, a citizen of Norway, these deeds were absolutely void under Nebraska law unless the Treaty with Norway validated them and permitted Knudson as a citizen of Norway to convey his homestead without complying with the Nebraska law.

14. That the County Court of Hamilton County, Nebraska, having exclusive jurisdiction, found that the petitioners herein were the sole and only heirs of Christian Knudson, deceased.

15. That the District Court of Hamilton County, Nebraska, the trial court, sustained the prayer of the

petitioners and quieted their title in this property on the sole ground that the deeds of Christian Knudson to his homestead were void under Nebraska law because not signed and acknowledged by his wife; that appeal was then duly taken to the Supreme Court of Nebraska.

16. That reversal was decreed in the Supreme Court of Nebraska on February 21, 1929, and Motion for Rehearing was overruled June 29, 1929, in said court, the sole ground of reversal being that Sec. 6 of the Treaty with Norway is repugnant to state statutes dealing with homestead conveyance (Secs. 2819 and 2832, Comp. St. Nebr., 1922).

B.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Supreme Court of Nebraska is erroneous in that it construes and applies the Treaty between the United States and Norway so as to give a citizen of Norway, residing in Nebraska, the right to convey real property owned by him in Nebraska, contrary to the laws of Nebraska.

2. The decision of the Supreme Court of Nebraska construes and applies said Treaty so as to deprive these petitioners of their right and title to the land in question, which they inherited under the laws of Nebraska, and they were entitled to the ownership thereof under the reasonable and proper construction of said Treaty with Norway.

3. The decision construes and applies said Treaty so that it violates the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States.

4. The decision construes and applies said Treaty so as to give to an alien greater rights over his homestead property in Nebraska than an American citizen has ever his homestead property.

5. The true purpose of the Treaty is to place citizens of Norway and citizens of the United States on an equality in the sale and transfer of their real estate. The decision of the Supreme Court of Nebraska creates inequality, giving a Norwegian alien greater rights, privileges and immunities than have citizens of Nebraska.

6. The decision deprives the petitioners of their property without due process of law.

WHEREFORE your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of of this Honorable Court, directed to the Supreme Court of the State of Nebraska, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 26236, *Knute C. Engen, Appellee, v. Union State Bank of Harvard, Nebraska, et al., Appellants,* and *Mari Tollefsen Todok, Appellee,* and that the said judgment of the Supreme Court of

Nebraska may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this court may seem meet and just; and your petitioners will ever pray.

MARI TOLLEFSEN TODOK,
KNUTE C. ENGEN,
By FRANK E. EDGERTON,
H. G. WELLENSICK,
C. C. FRAZIER,
NORRIS BROWN,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 412

MARI TOLLEFSEN TODOK AND KNUTE C. ENGEN, PETITIONERS,

VS.

UNION STATE BANK OF HARVARD, HARVARD, NEBRASKA, ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion in the Supreme Court of Nebraska is reported in *Engen* v. *Union State Bank*, — Nebraska, —, 223 N. W. 664. It is also found in the printed record, pages 90 to 98.

The opinion of the District Court of Hamilton County, Nebraska, the trial court, is the journal entry and decree and found on pages 40 to 46 of the printed record.

II.

Jurisdiction.

1. The date of the judgment of the Supreme Court of Nebraska to be reviewed is February 21, 1929. A Motion for rehearing was filed within proper time and this Motion was denied on June 29, 1929 (R. 80).

2. The specific claims advanced and rulings made in the lower court, which are relied upon as the basis of the Supreme Court's jurisdiction, are the following:

(*a*) It is specifically claimed by the petitioners that this construction of the Treaty is erroneous and unnecessary; that the Treaty and the Nebraska Homestead Act are both legal and effective when the Treaty is properly construed; that the Treaty confers no greater rights upon the alien and grants him no greater favors, immunities or privileges than it does to the citizens and that, therefore, the alien and the citizen being on an equality in the conveyance of the homestead, because of this removal of the limitations of alienage by the Treaty, the homestead act is effective in the transfer and conveyance of every homestead whether that of a citizen or an alien.

(*b*) The specific claim is then, that Christian Knudson buying his land in Nebraska and establishing his homestead thereon was by reason

of this Treaty and the provisions of the Nebraska Constitution placed on an absolute equality with citizens of the United States owning homesteads in Nebraska, but that the Treaty did not give him the unqualified right to transfer it by any means he saw fit. It is the specific claim of the petitioners that he stood, so far as the homestead is concerned, precisely on an equality with native Nebraskans and that he had no greater privileges or immunities with reference to the conveyance of that homestead.

(*c*) The specific claim is made that there has been drawn in question the construction and application of a Treaty and the validity of the Statutes of Nebraska on the ground that it is repugnant to the Treaty with Norway and that the title of these petitioners to this land is claimed under the Treaty with Norway properly construed and under the Statutes of the State of Nebraska, and that by reason thereof this court has jurisdiction.

(*d*) Rulings of Supreme Court of Nebraska declaring Homestead Law inoperative, thereby depriving petitioners of their titles to Homestead of Christian Knudson.

1. "The provisions of the homestead act (Com. St. 1922, 2816-2832), operating as restraints on alienation, are, to that extent, repugnant to, and inconsistent with, the rights guaranteed by terms of this Treaty (8 Stat. 64, Art. 6), stipulating that "the subjects of the contracting parties in the respective states, may freely dispose of their goods and effects ("*fonds et biens*") either by testament, donation or otherwise, in favor of such persons as they think proper."

2. "As to conveyances of real estate authorized by such Treaty, even though consisting of the dwelling house in which the grantor resides and its appurtenances, and the land on which it is situated, the restraints on alienation imposed by such Homestead Act are to that extent inoperative."

3. "On the contrary this instrument (the treaty with Norway) expressly stipulates for conferring upon the "subjects of the contracting parties in the respective states" the unlimited, unrestricted and unqualified right to "freely dispose" of their goods and effects ("*fonds et biens*"), either by testament, donation or otherwise (which necessarily include the right to convey by deed), in favor of such persons as they think proper." This, in legal effect, is wholly inconsistent with the right of dower, and, in like manner, inconsistent with the existence of statutory right of homestead, in real estate to which the Treaty applies."

4. "The Statutory provisions referred to (thus require a deed to homestead to be signed and acknowledged by both husband and wife), thus assume the nature of limitations, qualifications or modifications of the treaty itself, and, if valid, would necessarily change its true construction. Each of these provisions of the legislative enactment must therefore be considered to be *pro tanto* inconsistent with the terms of the controlling treaty properly construed. The conclusion follows that, to the extent inconsistent with the terms of the Treaty the statutory provisions are inoperative."

5. "Therefore, the legal effect of the conveyances executed by Christian Knudson must be

determined wholly by the powers conferred on him by Treaty, and not by the inconsistent limitations and restrictions prescribed in the Nebraska Homestead Act (Com. St. 1922, 2816-2832)."

6. "So considered, the validity of these conveyances cannot be questioned and they are each effective in vesting the titles to the lands described therein to the grantees therein named."

3. The Supreme Court of the United States has jurisdiction of this matter. Judicial Code, Sec. 237 B as amended February 13, 1925, 43 Stat. 936.

4. The following cases sustain the jurisdiction of the Supreme Court:

Larkin v. *Pough*, 276 U. S. 431; 48 S. Ct. 366.
Ireland v. *Woods*, 246 U. S. 323; 38 S. Ct. 319.

III.

Statement of the Case.

The petitioners were the wife and son of Christian Knudson, a citizen of Norway, who owned land and lived in Nebraska from 1878 to August 6, 1923, the date of his death.

Christian Knudson married the petitioner Mari Tollefsen Todok in Norway in 1867, and he came to the United States in 1868 leaving her in Norway, and the petitioner Engen was born in January, 1869, being a son of Christian Knudson and the petitioner Todok, and the issue of a lawful marriage. Knudson settled

in Nebraska in 1878 on the 160 acres in question in this suit and brought there his aged dependent father and mother, who lived with him there on the place until their deaths in 1900 and 1906. It was thus his homestead under the Nebraska law because he was a married man and because he had living with him on this place his aged dependent father and mother (Compiled St. of Neb., 1922, Secs. 2816-2830).

Knudson never became a citizen of America. He took out his first papers, but never completed his naturalization. In the later years of his life he became almost blind, but never abandoned his homestead. This was definitely found by the trial Judge (R. 40 to 46). The Supreme Court of Nebraska assumes it to be true.

On July 17, 1923, Christian Knudson, prior to his death on August 6, 1923, by mark, attempted to execute deeds to the 160 acres which was his homestead. These deeds were not signed and executed by his wife, the petitioner Todok, as required by Compiled Statutes of Nebraska, 1922, Sec. 2819.

After his death his widow and son, petitioners herein, brought this action to set aside these deeds and all subsequent conveyances on the ground that the deed of the homestead in Nebraska without the signature and acknowledgment of both husband and wife is void.

The trial court so found and set aside these deeds and all other conveyances.

The Supreme Court of Nebraska in its decision held that this positive statement of the law that the homestead cannot be conveyed unless the deed is signed and acknowledged by both husband and wife is repugnant

to Section 6 of the Treaty with Norway, which provides that the citizens of the contracting parties may "freely dispose" of their goods and effects.

It will thus be seen that there is just one question, and that is this: Does the Treaty with Norway give to Christian Knudson and other Norwegian citizens in Nebraska the right to so dispose of homestead property as to deprive their widows and sons of their statutory rights in that homestead?

It is the contention of the petitioners that Section 6 of the Treaty properly construed merely removed the restriction of alienage from Knudson and gave him the same rights, privileges and immunities in the transfer of his homestead property in Nebraska as any citizen would have.

Consequently, if that is the proper construction, then the Treaty and the Homestead Act of Nebraska operate side by side, each being legal and enforceable. If that construction obtains, then the widow and son of Knudson retain their right and title to the property of their husband and father because his attempted conveyance contrary to statutory law was void.

IV.

Specifications of Errors.

1. The Nebraska Supreme Court erred in finding and holding that Section 6 of the Treaty with Norway permits a Norwegian citizen in Nebraska to convey his homestead without the signature and acknowledgment of his wife, in violation of the Nebraska Homestead Act.

2. The Nebraska Supreme Court erred in finding and holding that the Treaty with Norway should be construed as giving a Norwegian citizen in Nebraska the unlimited, unrestricted and unqualified right to "freely dispose of his goods and effects" by deed, which construction is contrary to the Nebraska Statutes for the conveyance of homesteads and deprives these petitioners of their title to this land.

3. The Nebraska Supreme Court erred in finding and holding that the Nebraska Homestead Act (Comp. St. of 1922, Secs. 2816-2832) has limitations and restrictions which are inconsistent with the Treaty with Norway.

4. The Nebraska Supreme Court erred in finding and holding that the Nebraska Homestead Act is inoperative as to a citizen of Norway owning land in Nebraska.

5. The Supreme Court of Nebraska erred in finding and holding that the rights of petitioners as sole heirs of Christian Knudson are not protected by the Nebraska Homestead Act.

6. The Supreme Court of Nebraska erred in finding and holding that the Treaty between the United States and Norway gives a citizen of Norway owning land in Nebraska the unlimited, unrestricted and unqualified right to dispose of real estate in Nebraska without complying with the laws of conveyance of the State of Nebraska.

ARGUMENT.

Summary.

1. The decision of the Nebraska Supreme Court in construing the Treaty with Norway is contrary to and in conflict with federal and state decisions in holding that the Nebraska Homestead Act is repugnant to the Treaty. With reasonable interpretation, there is no conflict between the Treaty and the Homestead Act.

2. The Treaty with Norway was made to remove disabilities of alienage and to bring about equality and does not give to Norwegian aliens the right to convey real estate in Nebraska contrary to Nebraska law.

3. By holding that a Norwegian alien in Nebraska may convey his homestead contrary to Nebraska law, the Nebraska decision so construes and applies the Treaty with Norway that petitioners are deprived of their property without due process of law and are denied the equal protection of the law.

ARGUMENT.

The Treaty With Norway Does Not Conflict With the Nebraska Homestead Act.

The Supreme Court of Nebraska in its decision in this case holds that the Nebraska Homestead Act, which prohibits the conveyance of the homestead without signature and acknowledgment by both husband

and wife, is inconsistent with the rights guaranteed to citizens of Norway by terms of the Treaty.

The entire case hinges upon this interpretation of the Treaty with Norway. It is not questioned that Treaties are the Supreme law of the land and binding upon all courts in the Nation, and that it is the duty of a State court to enforce Treaty rights of aliens without regard to conflicting statutory provisions of the State.

The argument of the Supreme Court of Nebraska may be summed up as follows:

1. Christian Knudson was a resident alien of Nebraska, being a citizen of the Kingdom of Norway and this land was his homestead.

2. The Treaty between Norway and the United States provides that the citizens of Norway in the United States "may freely dispose of their goods and effects either by testament, donation or otherwise."

3. The Nebraska Court has already held that "goods and effects" include real estate. *Erickson* v. *Carlson*, 95 Neb. 182.

4. The Treaty is the Supreme law of the land.

5. The Nebraska Homestead Act, which provides that homesteads cannot be conveyed without the signature and acknowledgment of both husband and wife, is inconsistent with the terms of this Treaty because "freely dispose" means that the alien husband has a right to convey without being joined by his wife.

6. Therefore the Homestead Act, being inconsistent with the Treaty, is inoperative and a Norwegian alien

in Nebraska may himself by deed convey his homestead without his wife joining and his separate deed is valid because of the provisions of the Treaty with Norway.

This is the logic and reasoning used by the Supreme Court of Nebraska and by this reasoning the petitioners, the widow and son of Christian Knudson, are deprived of their legal rights to which they are entitled under the homestead law of Nebraska, and, we say, under the Treaty with Norway.

It is without dispute that this land was the homestead of a subject of Norway residing in Nebraska, and it is without dispute that the Nebraska court has held in *Erickson* v. *Carlson*, 95 Neb. 182, that "goods and effects" described in the Treaty with Norway include real estate in Nebraska.

The decision here then turns on the proper construction of the following words in the Treaty with Norway:

> "Freely dispose of their goods and effects either by testament, donation or otherwise in favor of such persons as they think proper."

It is elementary that where the fair interpretation of a Treaty will allow a State Statute to remain in effect, that interpretation will be adopted by the Courts. *Terrace* v. *Thompson*, 263 U. S. 197; 44 S. Ct. 15.

It is also elementary that where a Treaty admits of two constructions the one will be adopted which permits a State law to be operative. It is elementary that the courts will not find unconstitutional or render inoperative a state law where a Treaty is called in

question unless the Treaty specifically and clearly nullifies the state law. *Terrace* v. *Thompson, supra;*

It is elementary that Treaties may receive a fair interpretation according to the intention of the contracting parties and they must be so interpreted as to carry out their manifest purpose. *Wright* v. *Henkel,* 190 U. S. 40; 20 S. Ct. 78.

It is not for the courts to make the construction of a Treaty broader than the apparent intent and purpose of its language. *The Santissima Trinidad,* 7 Wheat. 283; *Terrace* v. *Thompson, supra.*

Where a Treaty might be construed in different ways a liberal fair construction which will leave unchanged State Statutes is to be preferred. *Hauenstein* v. *Lyndham,* 100 U. S. 483; *Asakura* v. *Seattle,* 265 U. S. 332; 44 S. Ct. 515.

Cobbitt, in *Leading Cases,* in International law, Vol. 1, p. 346, says:

> 1. "In the interpretation of international agreements, it is necessary in view of the different character of interests involved and the different conditions under which such agreements are commonly entered into, to adopt a more liberal method of construction than that which might fairly be applied in the case of private instruments. That is, a treaty must be construed throughout in the light of the larger national intents with which it deals and in view of the effect, which a particular construction, even though it may be a plain and literal construction, would have on them. (Westlake 1, 282.)"

2. "All international agreements must be construed in such a way as not to derogate from the fundamental principles of international law; or even from the fundamental rights of states except in so far as a contrary intention is explicitly manifested. In general, the words used must be construed in their plain and ordinary sense, save when they profess some 'customary' or 'special' meaning within the knowledge and contemplation of the parties."

A study of the Treaty between the United States and Sweden in 1783, which became the Treaty with Sweden and Norway in 1826, and is now effective as to Norway, clearly shows that neither country intended to interfere with the rights of their respective states to fully carry out political and economic equality between their citizens and the citizens of the other contracting party. It is stated in the beginning that the Treaty is a basis for avoiding "those burdensome preferences which are the usual sources of debate, embarrassment and discontent and by leaving each party at liberty to make, respecting navigation and commerce, those regulations which shall be most convenient to itself."

When nations enter into Treaties with each other, it is never the intention of one nation to give to the subjects of another nation greater rights, privileges or immunities than its own citizens enjoy. The idea always is to remove the disabilities of aliens and give the alien the right to stand on an equality with the citizen. In other words, it is to remove those burdensome preferences which are found in favor of a citizen against an

alien. The principle is stated by Chief Justice White in *Peterson* v. *Iowa*, 245 U. S. 170; 38 S. Ct. 109, in the following language:

> "In other words, the right of the citizens of each of the contracting countries reciprocally to own, dispose of or transmit their property situated in the other country, free from provisions or restrictions discriminating because of alienage, is in the largest possible sense that which is protected by the Treaty. And conversely this being true it follows also that the Treaty did not protect the citizens of either country to acquire by transfer or inheritance property situated in the other belonging to its own citizens free from the restraints imposed by the law of such country on its own citizens even although such restraints would not have been applicable in case the property had been disposed of or transmitted to a citizen."

It is clear that the proper meaning of the words "freely dispose" in the Treaty between Norway and the United States is that the citizens of Norway residing in America and owning property in America *were to be freed from the disabilities of alienage.* It is clear that the United States was not, in this treaty, granting to Norwegian aliens in America greater rights, privileges and immunities than are granted to American citizens.

If the interpretation of the Nebraska Supreme Court of Section 6 of the Treaty with Norway is correct, then a Norwegian alien in Nebraska may dispose of his real estate by simply handing to his grantee a piece of turf,

as conveyance was made in olden times. Or he may without a scrap of writing establish an express trust in the land, something which is also prohibited by the Nebraska Statutes. Or he may "freely dispose" of this real property by renting it for illegal purposes, such as a saloon or a nuisance of some kind and yet be protected by the Treaty with Nebraska laws inoperative if the Nebraska court properly construes and applies section 6 of the Treaty.

Throughout all of the history of Nebraska the Statutory prohibition against the conveyance of the homestead without the deed being signed and acknowledged by both husband and wife has been sustained and deeds of the homestead without complying with the Statutes are void and not merely voidable.

Ambler v. *Jones,* 102 Neb. 40; 165 N. W. 886;
Buettgenbach v. *Gerbig,* 2 Unof. 889; 90 N. W. 654;
Nat'l Bank v. *Chamberlain,* 72 Neb. 469; 100 N. W. 943;
Frank v. *Bell,* 52 Neb. 57; N. W. 984;
Whitlock v. *Gosson,* 35 Neb. 829; 53 N. W. 980;
Holyoke v. *Bishop,* 86 Neb. 490; 125 N. W. 1093;
Anderson v. Cusack, 115 Neb. 643.

Knudson occupied this land in 1878 and held it during all of the years of his life with the homestead exemption. He lived and died enjoying all of the rights, privileges and immunities of a citizen of Nebraska except the right to vote. He stood on an equality with other citizens and had the sheriff with an execution sought to sell his land the law of the home-

stead exemption would have stepped in to protect him.

He could not have these benefits of the homestead act without its burdens. He could not expect to enjoy its exemption and be free from the State's ruling that the homestead could not be conveyed without the wife joining in the deed of conveyance. The provisions of the Treaty which are interpreted and applied by the Nebraska Supreme Court, when fairly construed, mean that a resident alien Norwegian citizen in the United States is free from the restraints and disabilities of alienage so far as his property is concerned. It means that he can "freely dispose of his goods and effects" just the same and in the same manner as a citizen. Since the Nebraska Court has held that "goods and effects" include real estate, the Treaty means that the Norwegian alien can convey his real estate subject to the same laws as a Nebraska citizen. This construction of the Treaty is reasonable, just, probable, natural and liberal. It meets the requirements of all the authorities.

It is elementary that written instruments to convey the title to real estate must conform to the law of the state or country where the land is situated. *Kirkendall* v. *Weatherly*, 77 Neb. 42; 109 N. W. 757; 9 L. R. A. (N. S.) 515; *United States* v. *Fox*, 94 U. S. 315; *Story, Conflict of Laws*, 8th ed., Sec. 435, citing *United States* v. *Crosby*, 7 Cranch 115; *Kearn* v. *Moon*, 9 Wheat. 566; *McCormick* v. *Sullivant*, 10 Wheat. 192; *Darby* v. *Mayer*, 10 Wheat. 465.

The Nebraska Court has also held that the homestead exemption obtains in Nebraska, whether the oc-

cupant of the homestead is an alien or a citizen. *People* v. *McClay*, 2 Neb. 9.

The Nebraska constitution from 1875 up to its change in 1920 provided that "no distinction shall ever be made by law between aliens and citizens in reference to the possession, enjoyment or descent of property. Sec. 25, Art. 1, *Constitution of Nebraska*, 1875.

It will be seen that the fair and reasonable construction of the Treaty with Norway does not render inoperative the Homestead laws of Nebraska and does not deprive the widow and son of Knudson of their right and title to this real estate.

The treaty removed the disabilities of alienage and placed Knudson on an equal footing with other homestead owners in Nebraska.

The Treaty with Norway Grants Equality Between Norwegian Aliens and Citizens and No More.

In *Re Stixrud*, 58 Wash. 339; 109 Pac. 343; 33 L. R. A. (N. S.) 632, this same treaty was under consideration. The court finds in Section 6 a contract between the nations which shall put all citizens on the same basis.

This section was discussed by the court as follows:

> "It, of course, cannot be seriously contended that citizens of Sweden and Norway are, by the terms of this Treaty, accorded any greater rights in their succession to property than the general laws of the states of the Union may accord to citizens of the United States. The laws of the several states would undoubtedly control those rights, even though no reservation to that

effect was in the treaty. To whatever extent the right or privilege of a citizen of the United States to take property by testament or inheritance is impaired by our own laws, whether such laws relate to taxation or succession, to that extent will the rights of the citizens of Norway and Sweden be impaired, without violating the terms or spirit of this treaty. The language of the treaty giving the citizens of the contracting parties the right to dispose of their goods and effects by testament, and the right to receive the succession, must mean the right to so give and receive as such right may be defined by the general laws in force in the country where the property is situated. It could not mean otherwise, because there is no law to which we may turn, or which the contracting parties could have in view, in the making of the treaty, defining testamentary and succession rights, save the laws of the respective countries. There is no universal or international law of succession to property. In order then to give force and effect to the treaty, and avoid the destruction of the very end it was plainly intended to accomplish, we must conclude that the testamentary and inheritance rights secured thereby are such that they cannot be impaired except as such rights and privileges of citizens may be impaired by the laws of their own country."

In *Rocco* v. *Thompson*, 157 Cal. 552; 108, p. 516; 37 L. R. A. (N. S.) 549, where the Italian Consul claimed the right to administer the estate of a deceased Italian citizen in California, the favored-nation clause of the Treaty gave the Consul the right to "intervene in the

possession, administration and judicial liquidation of the estate of the deceased."

The California Court said this did not render inoperative the probate laws of the States.

The Court said:

> "It is also of grave importance because its solution in favor of the appellant necessarily ascribes to the Federal Government the intent, by means of the Treaty making power, to naturally abridge the autonomy of the several states and to interfere with and direct the state tribunals in proceedings affecting private property within their jurisdictions. It is obvious that such intent is not to be lightly imputed to the Federal government, and that it cannot be allowed to exist except where the language used in the treaty plainly expresses it, or necessarily implies it."

Rocca v. *Thompson, supra,* was affirmed in the Supreme Court, 223 U. S. 317; 32 S. Ct. 207. The court held that the treaty does not specifically give to the foreign consul the right to appointment as administrator and, therefore, the state law prevails.

In *The Aimable Isabella,* 6 Wheat. 1, the court held that courts will not alter, amend or add to a treaty by inserting any clause, small or great, any more than in a law.

In *Duus* v. *Brown,* 245 176, 38 S. Ct. 111, the court, construing Sec. 6 of the Treaty, held that it "by its text *embraces and protects from discrimination* only citizens or subjects of Sweden and their property in Iowa."

The Decision of the Supreme Court of Nebraska so Construes the Treaty with Norway that Petitioners are Deprived of Their Property Without Due Process of Law.

In 12 *C. J.*, 1195, the law is stated as follows:

> "The guarantees of due process of law extend to every governmental proceeding which may interfere with personal or property rights, whether the proceeding be legislative, judicial, administrative or executive, and relates especially to that class of rights the protection of which is peculiarly within the province of the judicial branch of the government."

The Fifth Amendment to the Federal Constitution provides that

> "no person shall • • • be deprived of life, liberty or property without due process of law."

By its unusual construction and application of the language of the Treaty with Norway, the Supreme Court of Nebraska deprives these petitioners of their property rights in this homestead without due process of law.

The petitioners contend that by every known and accepted rule of treaty construction this treaty gives to these petitioners their property. The nations entering into this treaty meant that their citizens should be placed on an equality with citizens of the other. They did not intend that the citizens of one nation should, in the other country, have greater rights and privileges than the citizens of that country.

We are not contending that the Treaty deprives petitioners of rights guaranteed by the Constitution. We do contend that the Nebraska Supreme Court construction and application of the Treaty does this very thing.

In other words, by this decision the Treaty is made to mean what it was not intended to mean and thereby petitioners are deprived of their property without a chance to be heard; without the regular forms of law in Nebraska dealing with a homestead being complied with.

The petitioners, as widow and son of Christian Knudson, have a property right in his homestead. The Supreme Court of Nebraska by judicial legislation adds to the treaty with Norway the words "the unlimited, unrestricted and unqualified right" to dispose of homestead property in Nebraska. With that construction, the treaty violates the constitutional prohibition in the Fifth Amendment to the Federal Constitution.

In *Hubbard* v. *Hubbard*, 77 Vt. 73; 2 Ann. Cas. 315, the court held:

> "No. 49 of the Acts of 1896, providing that the court of chancery, in its discretion, upon the petition of a married woman, may empower her to convey her real estate by separate deed as effectually as if the deed were executed by herself and her husband, is unconstitutional as depriving the husband of his property without due process of law, the exercise of the power conferred upon the court not being made to depend upon any proof of any prescribed facts but being left to the arbitrary and unregulated will of the court."

In the instant case, the Nebraska Court's unusual construction of the Treaty causes the Treaty to deprive petitioners of their property by giving to Knudson a right of disposition of homestead property prohibited by the State law under which he held title.

Due process of law called for a deed signed by both Knudson and petitioner Todok before petitioners would be deprived of their property rights.

The Decision of the Nebraska Court Denies Petitioners the Equal Protection of the Law.

The State of Nebraska, speaking through its highest court, has construed and applied the treaty with Norway so that the Treaty denies to these petitioners the equal protection of the law.

Any other widow and son in Nebraska have their property rights in a homestead protected from the single conveyance of husband and father.

Suppose Erick K. Engen, brother of Christian Knudson, should by deed convey his homestead without being joined by his wife. Upon his death, his wife and son could recover the title, because his deed was void. Erick K. Engen is a citizen of the United States. His brother Christian Knudson had a homestead just across the road. He conveyed it by deed signed by himself alone. The Supreme Court of Nebraska says in this decision he could do this because he was a Norwegian citizen and his wife and son have lost their interest in that homestead.

The wife and son of Christian Knudson are thus denied the equal protection of the law. This denial

rests in the erroneous construction of this treaty by the highest court of Nebraska.

The decision, therefore, violates the Fourteenth Amendment to the Federal Constitution.

> "While statements are lacking as to the equality of treatment which the executive and judicial departments must give in enforcing the laws of a State, it is certain that an intentional discrimination is forbidden." 12 *C. J.*, 1144.

The erroneous decision of the Nebraska Supreme Court has brought about a situation of discrimination against the widows and heirs of citizens of Norway owning real estate in Nebraska. Their property rights, under this construction of the Treaty, are not given equal protection of the law. This discrimination is effected by the action of the judicial branch of the State government in this most unusual decision.

In other words, the Treaty, as the Supreme law of the land, is so construed and applied by the Nebraska Court that it amounts to an unconstitutional discrimination by the State itself. It violates the Fourteenth Amendment under the docrine of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373; 6 S. Ct. 1064.

Conclusion.

We, therefore, respectfully submit that this case is one calling for the exercise by this Court of its supervisory powers, in order that a correct construction and application of the Treaty between Norway and the United States may be had and these petitioners may have protected their right and title to the homestead

property of their husband and father, which was never validly conveyed by him while living, and that to such an end a Writ of Certiorari should be granted and this Court should review the decision of the Nebraska Supreme Court and finally reverse it.

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NORRIS BROWN,
Counsel for Petitioners.

(9425)

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1930

MARY TOLLEFSON TABOR AND EDITH G. ENGEL, PETITIONERS,

v.

UNION STATE BANK OF HARVARD, HARVARD, NEBRASKA, A CORPORATION; CARLOS A. ROBERTS AND REBECCA M. ROBERTS; ROBERT H. BROWN AND ANNA S. BROWN; H. G. WILLIAMS, ADMINISTRATOR OF THE ESTATE OF CHRISTIAN ANDERSON, DECEASED; EDWARD CARTER, VERA M. PETERSON, AS EXECUTRIX OF THE ESTATE OF CHARLES PETERSON, DECEASED; NEBRASKA STATE BANK OF HARVARD, NEBRASKA; NEBRASKA STATE BANK OF HARVARD, NEBRASKA; AND THE FIRST TRUST COMPANY OF LINCOLN, NEBRASKA, RESPONDENTS.

ADDITIONAL BRIEF OF PLAINTIFFS IN ERROR.

FRANK H. YOUNGLOVE,
H. G. WILLIAMS,
C. C. FRADENBURG,
ROBERT BROWN,
Counsel for Petitioners.

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Number 412.

IN THE

SUPREME COURT

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October Term, 1929.

MARIE TOLLEFSEN TODOK AND KNUTE C. ENGEN, PETITIONERS,

V.

UNION STATE BANK OF HARVARD, HARVARD, NEBRASKA, A CORPORATION; LEROY A. MEGRUE AND BERTHA M. MEGRUE, ROBERT E. BROWN AND ANNA S. BROWN, H. G. THOMAS, ADMINISTRATOR OF THE ESTATE OF CHRISTIAN KNUDSON, DECEASED; THEODORE GRIESS, VAN E. PETERSON, AS RECEIVER OF THE UNION STATE BANK OF HARVARD, NEBRASKA; NEBRASKA STATE BANK OF HARVARD, NEBRASKA, AND THE FIRST TRUST COMPANY OF LINCOLN, NEBRASKA, RESPONDENTS.

ADDITIONAL BRIEF OF PLAINTIFFS IN ERROR.

FRANK E. EDGERTON,
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C. C. FRAIZER,
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Counsel for Petitioners.

STATEMENT.

The object in filing this additional brief on the part of the plaintiffs is to amplify the argument already pre-

sented in the brief in support of petition for writ of certiorari, which writ has been granted by the court.

This first brief was filed with the court September 20, 1929. The facts involved are briefly stated on pages 13, 14 and 15 in the former brief and will not be repeated here.

The sole question is the proper construction of the treaty between the United States and Norway. The District Court of Hamilton County, Nebraska, which tried the case, found that the land involved was the homestead of Christian Knudson and that he was a married man and that under the laws of Nebraska his deed executed alone, without his wife joining, was void.

The supreme court of Nebraska held that this Nebraska statute voiding such a deed is held in abeyance by the terms of the treaty between United States and Norway, wherein Norwegian aliens are granted the right to "freely dispose of their goods and effects."

The Supreme Court of Nebraska held that this treaty confers upon the Norwegian alien in Nebraska "the *unlimited, unrestricted and unqualified* right to freely dispose of his goods and effects."

It is the contention of the plaintiffs in error that the Supreme Court of Nebraska has thereby broadened and enlarged the language and scope of the treaty and that without such enlargement there would be no conflict between the treaty and the Nebraska homestead statute. In other words, the plaintiffs in error contend that there is no conflict between the treaty and the statute, and that the Nebraska statute is in full force and effect and that their property rights in the land in question

have never been lost through the deed to the homestead made by Christian Knudson without the joinder of his wife.

The argument of the Supreme Court of Nebraska in this case (*Engen* v. *Union State Bank, et al.*, 223 N. W. 664), is summarized in our former brief on pages 18 and 19.

It is the contention of the plaintiffs in error that *the treaty with Norway did nothing more than to remove the disabilities of alienage* and that an American and a Norwegian alien owning land in Nebraska are alike, subject to all of the laws of Nebraska, dealing with the conveyance of that land.

ARGUMENT.

I.

American citizens and Norwegian aliens owning land in Nebraska are placed on an equality by the treaty between the United States and Norway in so far as conveyance is concerned.

This treaty between United States and Norway is a contract between two nations and was entered into as a basis for avoiding "those burdensome preferences which are the usual sources of debate, embarrassment and discontent and by leaving each party at liberty to make, respecting navigation and commerce, those regulations which shall be most convenient to itself."

Treaties are, of course, the supreme law of the land. They are contracts which in utmost good faith should be carried out. The nations can not countenance the repudiation or abrogation of any part or portion of a treaty.

Treaties are made for the purpose of giving aliens a somewhat equal footing with citizens. No nation ever enters into a treaty for the purpose of giving aliens greater privileges, rights and immunities than its own citizens have in its own country.

Yet, if the construction of this treaty by the Supreme Court of Nebraska is a proper one, America has granted to Norwegian aliens in this country greater rights, privileges and immunities than American citizens have.

An American citizen owning a homestead in Nebraska cannot convey that homestead away from his wife and children. Under the Nebraska statute, as construed in authorities cited on page 23 of the former brief, a deed by a husband to a homestead without being joined by his wife is just a scrap of paper, nothing more. It has no validity.

Christian Knudson gave such a deed and the trial court held that it was void because, being a homestead, it did not meet the requirements of the Nebraska statute and decisions. The supreme court held that it was a valid deed because of the provisions of this treaty between the United States and Norway.

If there is a conflict between the treaty and the statute it must be an apparent one because it has frequently been held that

> "if under a proper construction of the treaty and the statute the latter can be given effect without violating the provisions of the treaty this should be done."
> 38 Cyc. 978.

In *Mariorano* v. *Baltimore, etc., R. Co.*, 213 U. S. 268, 29 S. Ct. 424, this principle was upheld. Here, the ad-

ministrator of the estate of a deceased Italian brought suit in the courts of Pennsylvania for damages. By the statutes of Pennsylvania, the right to recover damages for such death was conferred upon surviving relatives irrespective of their condition. However, the Pennsylvania court had held that the non-resident alien relatives of a deceased person did not have this right of action in the Pennsylvania courts.

The treaty between the United States and Italy gave to the citizens of each country the most constant protection and security for their property, and gave free access to the courts of justice in order to maintain their own rights.

The court in construing this treaty in conjunction with the Pennsylvania statutes and decisions said:

> "If an Italian subject, sojourning in this country, is himself given all the direct protection and security afforded by the laws to our own people, including all rights of actions for himself or his personal representatives to safeguard the protection and security, the treaty is fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety."

So, in the instant case the Nebraska statute dealing with homesteads can stand squarely operative with a fair and reasonable construction of the treaty with Norway. It is not necessary to add to the treaty with Norway that the Norwegian alien in this country has the "*unlimited, unrestricted* and *unqualified*" right to freely dispose of his real estate. The treaty says that he may

"freely dispose" of his "goods and effects," which can mean nothing else than that he can freely dispose of them under the laws of the state in which it is located. Some courts and the State Department take the position that this does not include real estate.

In *Fredcrickson* v. *Louisana*, 23 How. 645, there was a construction of the treaty with Wurtenberg concerning the transfer and descent of personal property. The treaty provided:

> "The citizens or subjects of each of the contracting parties shall have the power to dispose of their personal property within the states of the other by testament donation or otherwise; and their heirs, legatees and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property and may take possession thereof and dispose of the same at their pleasure, paying such duties as the inhabitants of the country where the property lies shall be liable to pay in like cases."

The statute of Louisiana provided for a tax of 10 per cent as a succession tax. It was contended that this treaty with Wurtenberg was contrary to the provisions of the statute and, therefore, the statute was inoperative. The court held that the purpose of the treaty was to enable aliens to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The court refuses to enlarge on the language of the treaty. The court says that the state statute treats citizens and aliens alike and no more could be expected.

The same thing was done in *Lehman* v. *State*, an Indiana case reported in 88 N. E. 365.

The general rule for construction of treaties and federal statutes is stated by this court in *Whitney* v. *Robertson*, 124 U. S. 190, 8 S. Ct. 456, in the following language:

> "When the two relate to the same subject the court will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."

This same language is stated to be the law of construction of statutes and treaties in 15 R. C. L. 161. In *United States* v. *Gue Lim*, 176 U. S. 459, 20 S. Ct. 415, the court said:

> "We ought, therefore, to so construe the act if it can reasonably be done so as to further the execution and not to violate the provisions of the treaty."

In *Hempel* v. *Weedin*, 23 Fed. (2d) 949, the court said:

> "A statute and a treaty should, if possible, be construed so that both can stand together and be given effect."

While these quotations are from decisions construing federal statutes and treaties there seems to be no reason why the same ruling should not apply to a construction of a state's statute in conjunction with a treaty.

If a reasonable and proper construction of the treaty leaves the state statute operative, then that construction of the treaty should be accepted.

In *Terrace* v. *Thompson*, 263 U. S. 197, 44 S. Ct. 15, where there was an action brought to enjoin the enforcement of a state law on the ground that it was in conflict with a treaty, the court said that *the plaintiff has the burden of showing the conflict.* It held that to prevail

on this point *the plaintiff must show the conflict between the state act and the treaty* where the provisions of the treaty do not specifically include lease of agricultural land.

In that case, the treaty provided that Japanese aliens might "own or lease and occupy houses, warehouses and shops" or "to lease land for residential and commercial purposes," or "to do anything incident to or necessary for trade."

The court said that this language cannot be said to include the right to own or lease or to have any title to or interest in land *for agricultural purposes.*

The court refused to read into the treaty language not specifically contrary to the statute.

In general, the words used in a treaty must be construed in their plain and ordinary sense and when the words of this treaty with Norway are so construed *the treaty means that the alien owning land in Nebraska may freely dispose of his land in accordance with the provisions of Nebraska law.* It is a strained construction of the treaty which would give to the alien the right to convey his homestead property in Nebraska in a manner different from that in which a citizen could convey his homestead property.

Chief Justice White, in *Petersen* v. *Iowa,* 245 U. S. 170, 38 S. Ct. 109, 110, in construing a treaty with Denmark, said:

> "Indeed, that which is contracted against is merely a departure by discrimination by either one of the countries against the citizens of the other and their property therein from the legislation governing their

> own citizens. In other words, the right of the citizens of each of the contracting countries reciprocally to own, dispose of or transmit their property situated in the other country free from provisions or restrictions discriminating because of alienage is in the largest possible sense that which is protected by the treaty."

The 6th Article of the treaty with Norway concludes in this language:

> "The United States on their part, or any of them, shall be at liberty to make, respecting this matter, such laws as they think proper."

This is, we believe, applicable to all preceding language in the 6th Article and it strengthens the belief that state laws apply to the Norwegian alien and his property equally with a citizen. The Norwegian in Nebraska cannot hold and convey his property here except under Nebraska laws.

The Iowa court in *Re Peterson*, 151 N. W. 66, L. R. A. 1916 A, 469, speaking of a suggested construction of this treaty, says, in surprise:

> "Were we to give the treaty the broad significance claimed for it, it would give to subjects of the Kingdom of Sweden, whether residents or non-residents of this country, greater rights in the property of an intestate than are possessed by our own citizens."

In this same case in the Supreme Court of the United States (*Duus* v. *Brown*, 245 U. S. 176, 38 S. Ct. 111), this court in the syllabus said that Sec. 6 of the treaty "*by its terms embraces and protects from discrimination* only citizens or subjects of Sweden and their property in Iowa."

The Washington court in *Re Stixrud*, 58 Wash. 343, 109 Pac. 343, 33 L. R. A. (N. S.) 632, says it cannot be seriously contended that citizens of Norway are, under this treaty, accorded greater rights than citizens of the United States.

> "The language of the treaty giving the citizens of the contracting parties the right to dispose of their goods and effects," says the court, "must mean the right to so give as such right may be defined by the general laws in force in the country where the property is situated."

Indeed, what other reasonable construction of the treaty can there be?

Knudson came to Nebraska, bought the land and settled on it as his homestead.

The Constitution of Nebraska then declared that there should be no distinction made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property.

Sec. 25, Art. 1, Constitution of Nebraska, 1875.

When he settled on this land as his homestead, the Nebraska law declared that his deed without the signature and acknowledgment of his wife was void.

Of course, it is clear that written instruments to convey title to real estate must conform to the law of the state where the land is situated (See authorities cited p. 24, former brief).

The language of the treaty does not give a Norwegian alien in Nebraska the right to convey his homestead property in any other manner than that provided by Nebraska law. Consequently, a construction of the treaty

which permits such an alien to disregard Nebraska law in conveyance of homestead property will not be allowed.

Rocco v. *Thompson*, 157 Cal. 552, 37 L. R. A. (N. S.) 549. Affirmed 223 U. S. 317, 32 S. Ct. 207.

> "It appears clear to us from this language that, whatever right was given, it was intended to be a right which could conform to the laws of the country, and that, in view of the well-known complex form of our government, the phrase 'laws of the country' so far as the United States is concerned, means the local laws of administration and procedure of the respective states."
>
> *Rocco* v. *Thompson*, *supra*.

II.

The deeds of Christian Knudson to his homestead in Nebraska were void.

That the land in question was the homestead of Christian Knudson is unquestioned. It was such from the time he established his home upon it with his dependent father and mother in 1886 until his death.

That he had a living wife in Norway, the petitioner Todok, at the time he signed the deeds to the homestead is not disputed.

That the wife of Knudson did not execute or acknowledge those deeds is unquestioned.

Therefore, we say, those deeds were void.

Since 1879, the Nebraska Statute has been the following:

> "The homestead of a married person cannot be conveyed or incumbered unless the instrument by

which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

Sec. 2819, Comp. St. Neb. 1922.

"If the homestead was selected from the separate property of either husband or wife it vests on the death of the person from whose property it was selected, in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will."

Sec. 2832, Comp. St. Neb. 1922.

Knudson never conveyed this homestead by will. He attempted to convey by deed in which his wife did not join.

Construing Section 2819, the Nebraska Supreme Court has uniformly held void deeds to the homestead not *executed and acknowledged by both husband and wife.*

"A contract in writing to convey a homestead which has been signed by both husband and wife, but which they have not acknowledged, is void and will not be in any way enforced."

Anderson v. *Cusack*, 115 Neb. 643.

Anderson v. *Schertz*, 94 Neb. 390.

"Estoppel cannot supply the statutory requirements of signature and acknowledgment to the incumbrance of a homestead where these are wanting."

Davis v. *Thomas*, 66 Neb. 26.

"It has been repeatedly held by this court that mortgages or conveyances of the homestead are void unless signed and acknowledged by both husband and wife."

Whitlock v. *Gosson*, 35 Neb. 829, 832.

"A homestead of a married person cannot be conveyed or incumbered unless the instrument by which

it is conveyed or incumbered is executed and acknowledged by both husband and wife."

Storz v. *Clark*, 117 Neb. 488.

"By an unbroken line of decision, this court has held that neither spouse has the right to dispose of the homestead except with the consent of the other and then only in the manner prescribed by the statute."

Storrs v. *Bollinger*, 111 Neb. 309.

The fact that one spouse is a non-resident of the state will not change this statutory rule.

"Here is a plain prohibition against the incumbrance of the homestead without the joint act of both husband and wife. It contains no exception with respect to an absent or insane husband or wife."

Whitlock v. *Gossson*, 35 Neb. 309.

Other states with similar statutes have ruled the same.

Rux v. *Adam*, 172 N. W. 913 (Minn.).

St. Dennis v. *Mullen*, 196 N. W. 258 (Minn.).

Murphy v. *Renner*, 109 N. W. 593 (Minn.).

Herron v. *Knapp*, 40 N. W. 149 (Wis.).

This rule is not changed by Section 1224, Comp. St. Neb. 1922, because the homestead and its conveyance or incumbrance are specifically controlled by Sections 2819 and 2832.

In *Cunningham* v. *Marshall*, 94 Neb. 302, to which reference is made by respondents, the court found, on the evidence, that neither the father nor his eldest son "ever acquired, occupied or claimed, when in possession, a homestead in the land."

It cannot rightfully be contended that this decision in the *Engen* case "fixes the meaning of state legislation."

The decision *incorrectly construes* a treaty, thereby holding a state statute inoperative.

III.

The treaty with Norway as construed by the Nebraska Supreme Court deprives petitioners of their property without due process of law and denies them the equal protection of the law.

We have little to add to the former brief (pp. 28, 29 30 and 31).

As already pointed out, the reasonable construction of the treaty brings about no conflict between it and the Nebraska statute.

However, the treaty as construed by the Nebraska Supreme Court does violate the Fifth Amendment. It deprives this widow and son of property rights by rendering inoperative a law of Nebraska.

Under the regular forms of law in Nebraska, this widow and son own this land. They have had it taken away by the Nebraska court, without a hearing.

The Union State Bank, Robert E. Brown, Anna S. Brown, H. G. Thomas, Administrator, and Theodore Griess in their answer to cross-petition of Todok alleged that she "is an alien subject of the Kingdom of Norway and is not entitled to take and hold real estate in the state of Nebraska for the reason that no treaty exists between the United States of America and the Kingdom of Norway whereby alien subjects of the Kingdom of Norway are permitted to acquire title by inheritance to real estate in the state of Nebraska" (Trans. p. 35).

The defendant First Trust Company in its answer made the same allegation (Trans. p. 37).

Todok in her reply set up the existence of the treaty (Trans. p. 39).

Between the petitioner Engen and the defendants, the treaty was not an issue. Its existence was not mentioned in the pleadings.

Admitting that pleading the treaty was not necessary and that the court could take judicial notice of this treaty as it might any statute, yet the decision of the Nebraska court, in taking a position on the treaty never pled nor argued in the trial court deprived petitioners of their day in court and took away their property rights without due process of law. The state court put in the hand of the United States government the treaty construction which thus deprived petitioners of their property.

For that reason, we say, the petitioners are deprived of their property without due process as guaranteed by the Fifth Amendment.

Also, it is perfectly clear, this construction of the treaty denies petitioners the equal protection of the law in Nebraska. It takes all Norwegian aliens owning land in Nebraska out of the general class and puts them in a class by themselves—a class not governed by the conveyancing laws of Nebraska. The decision strikes down the state moto, "Equality before the law" and raises class distinction.

If this inequality before the law were required by a reasonable construction of the treaty we would complain in vain, but the construction placed upon the treaty is unreasonable and unnatural.

Petitioners are entitled to the benefits of the statute, which provides that

> "all persons within the jurisdiction of the United States shall have the same right in every state and territory * * * to the full and equal benefit of all laws, etc."
>
> Sec. 1977, Revised Statutes.

> "The equal protection of the laws is a pledge of the protection of equal laws."
>
> *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 1070.

CONCLUSION.

We respectfully ask for a reversal of the decision of the Nebraska Supreme Court on the ground that the treaty, properly construed, does not conflict with the homestead act of Nebraska, but that both treaty and statute operate side by side. We ask the court to construe the treaty to mean that Americans and Norwegian aliens owning property in Nebraska are subject to the conveyancing law of Nebraska and that the treaty, if it applies to real estate at all, merely removes the discrimination of alienage.

Respectfully submitted,

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